83-631

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SPACEFONE CORPORATION,

Petitioner,

VS.

WILLIAM J. JOHNSTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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ATTORNEY FOR PETITIONER

September 28, 1983

QUESTIONS PRESENTED

1. Whether provisions of the Fair Labor Standards Act are applicable to a company, formed solely for the development and eventual manufacture of a single product, which never successfully develops and sells any product?

2. Whether a single unperfected prototype produced by a company can be considered "goods" within the Fair Labor Standards Act provision of "Production of goods for commerce" when the company has no other business other than the unsuccessful development of the prototype?

3. Whether the movement of a single prototype, which was shown to investors out of state who elected not to invest in the further development of the prototype, falls within the Fair Labor Standards Act's

definition of "production of goods for commerce"?

PARTIES

Spacefone Corporation ("Spacefone") appeared as a defendant-appellee before the United States Court of Appeals for the Eleventh Circuit. William J. Johnston ("Johnston") appeared as the plaintiff-appellant before the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner Spacefone Corporation ("Spacefone") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals as amended on rehearing is contained in the

accompanying Appendix and is reported at 706 F.2d 1178 (11th Cir. 1983). The opinion of the United States Court for the Northern District of Georgia is contained in the accompanying Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit reversed the Order of the United States District Court for the Northern District of Georgia dismissing this case for lack of jurisdiction over the subject matter. Jurisdiction was predicated under the Fair Labor Standards Act, 29 U.S.C. § 216(b).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fair Labor Standard Act, 29 U.S.C. § 206(a) provides in pertinent part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates.

STATEMENT OF THE CASE

A. FACTS

Spacefone was incorporated for the purpose of doing research and development work on a state of the art cordless telephone with the eventual plan of marketing and manufacturing this product. The work began in February, 1980, and has continued to date, with no cordless telephone unit having been produced or sold anywhere. Spacefone has never manufactured, produced or sold products of any kind, and is currently continuing in its attempts to finalize development of an experimental cordless

extension telephone. It has no other business other than the attempted development of this product.

Johnston was hired by Spacefone to work as a designer and draftsman toward the eventual creating of a package in which to house the Spacefone cordless telephone. Pursuant to these duties, he was required to build dyes for the vacuum form machine, to trim plastic, and to do some testing of materials and circuit boards.

Johnston was infrequently called upon to order sample parts for an experimental prototype; these interstate telephone calls were not part of his regular duties, were incidental to his primary employment, and did not constitute a substantial portion of appellant's time.

No products of any kind were ever produced, sold, or moved in interstate commerce

while Johnston worked with Spacefone. One unperfected prototype was twice taken out of state to show potential investors, but none of the investors ever invested funds in the company.

B. OPINIONS BELOW

This suit instituted by Johnston against Spacefone to recover wages allegedly due by reason of Spacefone's failure to pay him the minimum wage and premium pay of time and one-half his regular rate for hours he worked in excess of forty hours pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.).

The case was tried in the District Court for the Northern District of Georgia, Newnan Division, the Honorable G. Ernest Tidwell presiding without a jury. The trial

court elected to hear initially only evidence relating to the question of the subject matter jurisdiction of the court. After the close of the evidence of this issue, the trial court granted Spacefone's Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter.

Johnston appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit reversed (Judge Roney dissenting) finding that the facts showed that Johnston had been engaged in the production of goods for commerce, thereby subjecting Spacefone to the application of the Fair Labor Standards Act.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because The Eleventh Circuit's Expansive Interpretation of "Production Of Goods For Commerce" Oversteps Previously Established Limits of This Court.

A. THE "FOR COMMERCE" REQUIREMENT

Johnston had the burden of proving that he had a role in "producing goods", and that these "goods" had to be "for commerce". Yet the evidence was undisputed that while Spacefone had hopes and dreams of eventually marketing and manufacturing a cordless telephone, it had failed in its attempts to do so. No phones were ever made or sold by Spacefone. Spacefone never got into business and thus never entered "commerce".

The Eleventh Circuit found that the two unsuccessful attempts to solicit investors interstate combined with Spacefone's eventual intent to market the product was

sufficient to meet the "for commerce" requirement. This interpretation conflicts with the Supreme Court's opinion in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946). After first reviewing the first legislative history of the Act, the Supreme Court in Mabee observed:

> By § 15(a)(1) it had made unlawful the shipment in commerce of "any goods in the production of which any employee was employed in violation of" the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded depending on their size.

327 U.S. at 181, 182 (emphasis added). Under this interpretation of legislative intent, a court must look to "regularity" and not size to determine if the "commerce" provision is fulfilled. In the present

case, two trips in twelve months to unsuccessfully demonstrate an unperfected prototype can hardly be called "regular shipments". Moreover, the evidence clearly supports a finding that if the prototype itself could be classified as "goods", its limited movement interstate was an "occasional" shipment of an "insubstantial amount of goods".

The Eleventh Circuit's reliance on Spacefone's eventual intent to manufacture and market the product is the result of an overly broad reading of what this Court said in U.S. v. Darby, 312 U.S. 100 (1940). There the Court's analysis of the legislative history of the Act was:

> [T]hat the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce, although, through the exigencies of the business, all of the goods may

> not thereafter actually enter interstate commerce.

312 U.S. at 118 (emphasis added). While this standard may have an application to an on-going multi-product manufacturing concern, it can not be applied to a company in the embryonic stage of Spacefone. How can one judge Spacefone's intent according to its "normal course of its business", when Spacefone has never been in business? What standards does a Court use to analyze the "exigencies of the business" when the business is non-existent? Unless the Eleventh Circuit's decision is reversed, future courts must engage in unwarranted speculation.

This Court has recognized numerous times that Congress did not intend to go to the full limits of its commerce power in the Fair Labor Standards Act. E.g., 10 E. 40th St. Bldg., Inc. v. Callus, 325 U.S.

578 (1945); Kirschbaum v. Walling, 316 U.S. 517 (1942); Walling v. Jacksonville Paper, 317 U.S. 564 (1943). By necessity linedrawing on a case-by-case basis is required of the trial court. After hearing the evidence, the district court below drew the line in favor of Spacefone. This Court is asked to consider the Eleventh Circuit's analysis of the commerce requirement in light of the Supreme Court's guidelines in this regard and to adopt Judge Roney's dissenting opinion and the district court's conclusion on this issue.

B. THE REQUIREMENT OF "GOODS"

Since Spacefone never manufactured a finished product, the Eleventh Circuit had to rely on the one unperfected prototype as "goods" within the meaning of the Act. Citing Wirtz v. A. S. Giometti & Associates,

Inc., 399 F.2d 738, 739 (5th Cir. 1968) and Shultz v. Merriman, 425 F.2d 228 (1st Cir. 1970), the decision below classifies the one prototype as "goods". Even ignoring the grammatical problem with plurality in the statute, this Court should grant a writ of certiorari to review the conclusion below on this issue in light of the evidence of Spacefone's intent for use of this prototype. The prototype was an experimental model. Even though unperfected, the prototype was shown to two potential investors, but it was never Spacefone's intent to sell the prototype to the investors. Spacefone was tying to induce the investors to buy stock in the company to finance an eventual manufacturing plan. There is no evidence to suggest that Spacefone was in the business of selling prototypes as "goods". Even the Eleventh Circuit's opinion recognizes

that Spacefone's intent was to be a manufacturer.

The evidence is vastly different from that in the Giometti and Merriman cases as those companies were surveying companies which were in the business of selling maps as their "goods".

Upon reconsideration the Court is asked to review the undisputed evidence below as to Spacefone's intent for the use of the prototype, and to conclude that because of this intent the prototype could not be classified as "goods".

C. THE "PRODUCTION" REQUIREMENT

In order to decide this case, it was not necessary for the Court to resolve the conflict between the two district court decisions in Krill v. Arma Corp., 76 F.Supp.

14, 17 (E.D.N.Y. 1948) and Tormey v. Kiekhaefer Corp., 76 F.Supp. 557, 559 (E.D. Wis. 1948), as to the issue of whether research on products never making the production line was part of the production process. Unlike the present case, both of those cases dealt with companies that were already in production with numerous products.

The Tormey decision is not persuasive on the more narrow issue of whether a single product company who wishes to get into the manufacturing of a product but fails to even get through the product development stage, can be said to have been in "production". In other words, if the company's goal is to manufacture a cordless telephone and no product is ever manufactured and the company is never in business, can the company be classified as being in

"production"? Judge Roney's dissenting opinion provides the most reasoned answer to these questions, and should be adopted by the Court.

II. The Writ Should Be Granted In Order To Resolve The Conflict Below On The Issue Of Whether Research On A Product Never Produced Amounts To A "Production".

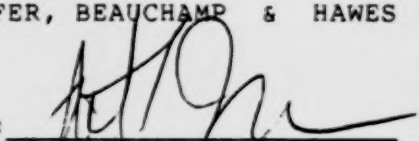
Assuming arguendo that this Court should find the Tormey decision not to be distinguishable on its facts, this Court should take this opportunity to resolve the conflict between the Krill and Tormey decisions. This Court is urged to adopt the Krill rationale and to accept the more limited interpretation of "production" contained in Judge Roney's dissenting opinion below.

CONCLUSION

For all of the within and foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

COFER, BEAUCHAMP & HAWES

By: 

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM J. JOHNSTON	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION FILE NO. C81-85N
	)	
SPACEFONE CORPORATION	)	
	)	
Defendant	)	

ORDER DISMISSING ACTION FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

Plaintiff brought this action pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.), seeking to recover wages he alleged were due to him by reason of the failure of defendant to pay him the minimum wage for each hour he worked and the premium pay of time and one-half his regular rate of pay for hours he worked in excess of 40 hours.

Defendant contends that plaintiff was not covered by the provisions of the Fair Labor Standards Act, and that the case should be dismissed for lack of jurisdiction over the subject matter.

At the non-jury trial of the matter, the court elected first to hear evidence only as to the question of coverage under the Fair Labor Standards Act. At the close of the evidence the defendant moved for dismissal for lack of jurisdiction over the subject matter arguing that plaintiff did not carry his burden of proof as to the question of coverage under the Fair Labor Standards Act. The court hereby grants defendant's motion and dismisses this action for lack of jurisdiction over the subject matter.

Findings of Fact

1.

Spacefone Corporation was incorporated for the purpose of doing research and development work on a state of the art cordless telephone. This work began in February, 1980, and has continued to date, with no cordless telephone unit having been produced or sold. The company has never manufactured, produced,

or sold products of any kind, but continues the development of an experimental cordless extension telephone.

2.

Plaintiff was hired by defendant to work as a designer and draftsman toward the eventual creation of a package in which to house the Spacefone cordless telephone.

3.

Plaintiff's primary duties with defendant consisted of designing plastic housing for a prototype telephone, drafting lay-outs of electronic schematics and some printed circuit board lay-outs. In connection with these duties he was called upon to build dyes for the vacuum form machine, to trim plastic, and to do some testing of the product and printed circuit boards from negatives.

4.

While plaintiff was infrequently called upon to order sample parts for an experimental prototype, such interstate telephone calls were not part of his regular duties, were incidential to his primary employment, and did not constitute a substantial portion of plaintiff's time.

Conclusions of Law

1.

Plaintiff has the burden of proving that he is covered under the Fair Labor Standards Act.

2.

Defendant is not an enterprise engaged in commerce or in the production of goods for commerce within the meaning of 29 U.S.C.A. § 203(s) since it has never sold any products whatsoever.

3.

Plaintiff failed to carry his burden of proving that he was engaged in commerce or in the production of goods for commerce; consequently, this court finds it has no jurisdiction over the subject matter of this action.

Based upon the foregoing, the court finds that there is no jurisdiction over the subject matter in this case, and the defendant's motion to dismiss is granted with prejudice with all costs to be taxed to the plaintiff.

SO ORDERED, this 19 day of February, 1982.

G. ERNEST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

cause the intent of the parties is unclear, further factual determinations are necessary and summary judgment was improper. *See McGraw Edison Credit Corp. v. Motorola, Inc.*, 579 F.2d 885, 886 (5th Cir.1978); *Monroe Ready Mix Concrete, supra*, 439 A.2d at 363; *Bead Chain Mfg. Co. v. Sarton Products, Inc.*, 183 Conn. 266, 439 A.2d 314, 319 (Conn.1981).

[8-8] Summary judgment was proper for the remainder of Pines' claims. Pines' claim for breach of fiduciary duty arose, at the latest, on November 1, 1977, when all his pension payments were terminated. The district court correctly determined that Pines' claim was *ex delicto* and therefore barred by the one-year statute of limitations contained in Ala.Code § 6-2-39 (1975). *See Jefferson County v. Resch*, 368 So.2d 250, 252 (Ala.1978) ("[I]f the wrong springs from a breach of a duty either growing out of the relationship of the parties, or imposed by law, the claim is *ex delicto*."). The district court was also correct in finding that Pines' claim of fraud was time-barred by the one-year statute of limitations set out in Ala.Code § 6-2-3 (1975). Under Alabama law fraud is deemed to have been discovered when it ought to have been discovered. *Sarton v. Liberty National*, 405 So.2d 18, 21 (Ala. 1981). When Pines' benefits were terminated in November 1977, Pines was in possession of facts that would have led a prudent person to make further inquiry as to the possibility of fraud. *See id.* Although Pines argues that there was a factual dispute whether he should have discovered the fraud more than a year before filing suit, mere allegations cannot defeat summary judgment. *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 900 (5th Cir.1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981). And Pines can point to no evidence supporting his allegation that he was prevented from obtaining information by the fiduciary nature of Warnaco's relationship to him.

[9] Finally, Pines cannot prevail on his claim of promissory estoppel because he did not rely to his detriment on the promise contained in the December 27, 1972, letter. *Cf. Ames v. Pardue*, 389 So.2d 927, 931 (Ala.1980) (fraud). For an action of promissory estoppel one must show that the promise induced "action or forbearance of a definite and substantial character." *Bush v. Bush*, 278 Ala. 244, 177 So.2d 568, 570 (Ala. 1964). Although Pines argues that he refrained from exercising his legal rights against Gus Mayer II, any legal action at the time would have been fruitless. *See Soar v. National Football League Players Assoc.*, 438 F.Supp. 337, 345 (D.R.I.1975), *aff'd*, 550 F.2d 1287 (1st Cir.1977).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

William J. JOHNSTON,
Plaintiff-Appellant,

v.

SPACEFONE CORPORATION,
Defendant-Appellee.

No. 82-8143.

United States Court of Appeals,
Eleventh Circuit.

June 9, 1983.

Suit was brought against plaintiff's former employer for minimum wages and overtime pay allegedly due under the Fair Labor Standards Act. The suit was dismissed by the United States District Court for the Northern District of Georgia at Newnan, G. Ernest Tidwell, J., for want of subject jurisdiction. On appeal by the plaintiff, the Court of Appeals, Godbold, Chief Judge, held that: (1) employee hired to assist in development of "state-of-the-art" cordless telephone was "engaged in the production of goods for commerce" because employer reasonably expected product to

move or cause movement in interstate commerce, because employee was involved in actually producing the prototype, and because employer by circulating the prototype interstate to investors attempted to sell it interstate, and it was not necessary that product actually have been distributed in interstate commerce, and (2) although Act requires production of "goods," Act would not be interpreted literally to require production of "goods" as opposed to "good," and employer was within Act though it produced only one prototype.

Reversed and remanded.

Roney, Circuit Judge, dissented and filed opinion.

1. Commerce ⇐42.43

In determining whether employee was "engaged in the production of goods for commerce" for purposes of Fair Labor Standards Act, court was required to focus on employee's activities, rather than general nature of his employer's business. Fair Labor Standards Act of 1938, § 3(j), 29 U.S.C.A. § 203(j).

See publication Words and Phrases for other judicial constructions and definitions.

2. Commerce ⇐42.45

Under Fair Labor Standards Act's jurisdictional requirement that worker be either "engaged in the production of goods for commerce" or "engaged in commerce," "actual production" is not confined to physical work on final project, and worker hired to assist in development of cordless telephone and whose responsibilities included constructing dies, trimming plastics, drafting parts, laying out electronic circuitry and some testing was engaged in "actual production" though project remained in experimental stage and mass production had not yet begun. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 3(j), 6, 7, 29 U.S.C.A. §§ 201 et seq., 203, 203(j), 206, 207.

3. Labor Relations ⇐1124

By denying coverage to employees who merely "affect" commerce, Congress chose not to extend coverage of Fair Labor Standards Act to the constitutional maximum, but, within tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with congressional direction. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 6, 7, 29 U.S.C.A. §§ 201 et seq., 203, 206, 207.

4. Labor Relations ⇐1102

Primary purpose of Congress in refusing to extend coverage of Fair Labor Standards Act to its constitutional maximum was to leave regulation of "local" business to the states. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 6, 7, 29 U.S.C.A. §§ 201 et seq., 203, 206, 207.

5. Commerce ⇐42.62

Employee hired to assist in development of cordless telephone was employed in improvement of instrumentality of commerce, and where employer used its unperfected prototype to solicit investors interstate and fully intended that completed product would eventually be distributed in interstate commerce, employee was "engaged in the production of goods for commerce" because employer reasonably expected product to move or cause movement in interstate commerce, because employee was involved in actually producing the prototype, and because employer by circulating the prototype interstate to investors attempted to sell it interstate. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 3(j), 6, 7, 29 U.S.C.A. §§ 201 et seq., 203, 203(j), 206, 207.

6. Commerce ⇐42.40

Congress may constitutionally regulate production aimed at improving or changing instrumentalities of interstate commerce, even if production is in preliminary stages, and Fair Labor Standards Act is within constitutional power of Congress to regulate matters that "affect" commerce. Fair Labor Standards Act of 1938, §§ 1 et seq., 3, 6, 7, 29 U.S.C.A. §§ 201 et seq., 203, 206, 207.

7. Labor Relations ⇐1122

Although Fair Labor Standards Act requires production of "goods," Act would not be interpreted literally to require production of "goods" as opposed to "good," and employer was within Act though it produced only one prototype. Fair Labor Standards Act of 1938, § 3(i), 29 U.S.C.A. § 203(i).

Word, Cook & Word, Reuben M. Word, James F. McNamara, Carrollton, Ga., for plaintiff-appellant.

Cofer, Beauchamp, Hawes & Brown, Robert S. Jones, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and PITTMAN *, District Judge.

GODBOLD, Chief Judge:

This appeal concerns William Johnston's suit against his former employer, Spacefone Corporation, for minimum wages and overtime pay allegedly due under the Fair Labor Standards Act (FLSA). The district court dismissed Johnston's suit for want of subject matter jurisdiction, holding that Johnston was neither "engaged in commerce" nor "engaged in the production of goods for commerce." 29 U.S.C. Sec. 203, 206, 207. Finding that Johnston was engaged in the production of goods for commerce, we reverse.

Spacefone hired Johnston as a designer/draftsman to assist in the development of a "state-of-the-art" cordless telephone. Johnston's specific responsibilities included constructing dies, trimming plastics, drafting parts, laying out electronic circuitry and some testing. At the time of trial Spacefone's project remained in the experimental stage. Although Spacefone developed an unperfected prototype that was transported interstate in an attempt to solicit investors for the project, it had not yet begun mass production of a finished product. Whether such production will ever occur is a matter of uncertainty.

Johnston initially worked for Spacefone as a part-time employee but he soon began to work full-time. Despite the absence of a formal written contract, the parties agreed that Johnston was to receive $250 per week for his services. While Johnston sometimes received the agreed upon sum, he sometimes received nothing at all. Johnston now seeks to invoke FLSA to recover minimum wages and overtime pay. The only issue on appeal is whether Johnston meets the FLSA's jurisdictional requirements because he was either "engaged in production of goods for commerce" or "engaged in commerce" while employed by Spacefone.

[1] As the statute's language suggests, Johnston can demonstrate FLSA's applicability by showing that he was engaged in (1) "production" of (2) "goods" (3) "for commerce." In determining whether Johnston was so engaged, we must focus on Johnston's activities, rather than the general nature of his employer's business. *See Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 79 S.Ct. 260, 3 L.Ed.2d 243 (1959).

> According to the Act, an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof. . . .

29 U.S.C. Sec. 203(j). An employee thus "produces" goods if he is engaged either in actual production or in a "closely related process" that is "directly essential to" actual production.

[2] Equating actual production with physical work on the employer's final prod-

* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

uct, Spacefone argues that Johnston was not engaged in actual production. It further contends that because actual production, so defined, has never begun, Johnston cannot have been engaged in a "closely related process ... directly essential" to actual production.

The critical flaw in Spacefone's argument lies in its premise that actual production is confined to physical work on the final project. In *Borden Co. v. Borella*, 325 U.S. 679, 683, 65 S.Ct. 1223, 1225, 89 L.Ed. 1865 (1945), the Supreme Court defined actual production more broadly to encompass the planning stages as well as final physical production of the product. The Court there held that FLSA covers maintenance employees who worked in an office building staffed by Borden's executive and administrative employees. No physical production on the final goods occurred in the building but the Court held that executive and administrative employees who planned the product were engaged in actual production stating:

> Economic production, in other words, requires planning and control as well as manual labor. [footnote omitted] He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it. From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are *actually engaged in the production of goods for commerce* just as much as are those who process and work on the tangible products in the various manufacturing plants.

325 U.S. at 683, 65 S.Ct. at 1225 (emphasis added).[1] Accordingly, the Court held that the maintenance employees performed tasks "necessary to" the actual production of the administrative and executive employees and could claim the benefit of FLSA's provisions.[2]

In light of *Borden*'s broad definition we hold that Johnston was engaged in actual production. Like the administrative and executive employees in *Borden*, Johnston was actively involved in the planning stages of Spacefone's product.

The more difficult steps in our analysis concern whether Johnston was engaged in producing "goods" "for commerce." Although Spacefone fully intends to produce cordless telephones for interstate distribution, the preliminary planning process in which Johnston was involved has not yet come to fruition. Spacefone accordingly argues that because it has not yet produced and distributed a finished cordless telephone, Johnston could not have been engaged in producing "goods" "for commerce."

The district courts that have addressed this issue have reached opposing conclusions. In *Krill v. Arma Corp.*, 76 F.Supp. 14, 17 (E.D.N.Y.1948), the FLSA plaintiff, an engineer, was involved in the experimental development of fire control and navigational instruments for ships. Noting that there was no evidence that the plaintiff's developmental work was ever used to produce a tangible product, the court held that FLSA did not apply. In *Tormey v. Kiekhaefer Corp.*, 76 F.Supp. 557, 559 (E.D.Wis. 1948), an engineer had worked on an experimental aircraft engine that was never put into production. The district court held that the plaintiff was engaged in the production of goods for commerce, explaining:

> It would indeed be a novel construction of [FLSA] to hold that one was not entitled to the overtime pay benefits of the Act because the project on which he worked

1. *See also Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 503, 65 S.Ct. 335, 341, 89 L.Ed. 414 (1945) ("production" includes "all steps whether manufacture or not, which lead to readiness for putting goods into the stream of commerce"). Echoing *Borden*, the applicable regulations define actual production to include "the administration, planning, management, and control of the various physical processes ...." 29 C.F.R. Sec. 776.18(d) (1982).

2. When *Borden* was decided 29 U.S.C. Sec. 203(j) covered employees engaged in processes "necessary to" actual production. The present version covers employees engaged in processes "closely related" and "directly essential" to actual production.

did not measure up to expectations and was eventually abandoned before any of the product designed was shipped across State lines.

See also Wirtz v. Koch, 301 F.Supp. 957 (D.S.D.1969) (architectural plans, drawings and blueprints sent out-of-state constituted "goods" even though plans were not ultimately used).

[3, 4] Guided by the underlying purposes of FLSA's jurisdictional provisions, we believe that *Tormey* states the more reasonable result. By denying coverage to employees who merely "affect" commerce, Congress chose not to extend FLSA's coverage to the constitutional maximum. "However, within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211, 79 S.Ct. 260, 263, 3 L.Ed.2d 243 (1959). Congress's primary purpose in refusing to extend FLSA's coverage to its constitutional maximum was to leave regulation of "local" business to the states. *See* Conference Rep. No. 1453, 81st Cong. 1st Sess. (1949) *reprinted in* 1949 U.S. Code Cong. Service 2241, 2251, 2252–54 (listing examples of "local" businesses); *10 E. 40th St. Building, Inc. v. Callus*, 325 U.S. 578, 582–83, 65 S.Ct. 1227, 1229, 89 L.Ed. 1806 (1945); *Kirschbaum v. Walling*, 316 U.S. 517, 520–21, 62 S.Ct. 1116, 1118, 86 L.Ed. 1638 (1942).

Johnston's activities here are plainly not the type of local activity that Congress wished to exclude from FLSA. First, Johnston was employed in the improvement of an instrumentality of commerce. *See Mitchell v. Owen*, 292 F.2d 71, 73 (6th Cir. 1961) ("It is settled law that the production of materials for use in the improvement ... of ... instrumentalities of interstate commerce constitutes the production of goods for commerce") (citing *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745 (1953)). Second, Spacefone used its unperfected prototype to solicit investors interstate. Finally, Spacefone fully intends that a completed product will eventually be distributed in interstate commerce.

[5–7] In light of these considerations we hold on these facts that it is not necessary that the employer's product actually have been distributed in interstate commerce. Using the test adopted in *Wirtz v. Ray Smith Transport Co.*, 409 F.2d 954, 957 (5th Cir.1969), Johnston was engaged in producing "goods" "for commerce" because Spacefone "reasonably expect[ed its] product to move or cause movement in interstate commerce...."[3] *See U.S. v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609 (1941).[4]

We reach the same result on the basis of a theory that treats Spacefone's prototype as a "good" for purposes of FLSA. Even accepting arguendo Spacefone's narrow definition of actual production as physical work on the final product, Johnston was involved in actually producing the prototype. He *inter alia* trimmed plastic for the prototype and tested the product.[5] Second, the prototype constituted a "good" within

3. So interpreted, FLSA is within Congress's constitutional power to regulate matters that "affect" commerce. *See e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *U.S. v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). Congress may constitutionally regulate production aimed at improving or changing instrumentalities of interstate commerce, *see Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745 (1953), even if the production is in preliminary stages.

4. "production for commerce" ... includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

5. Under Spacefone's definition of "actual production," Johnston's other activities such as drafting layouts of electronic schematics and building dies for the vacuum form machine, if not actual production, were closely related and directly essential to the actual production of the prototype.

the meaning of Sec. 203(i).[6] The former Fifth Circuit and other courts have held that plans prepared by surveyors, draftsmen and the like are goods within the meaning of FLSA. *See Wirtz v. A.S. Giometti & Associates, Inc.*, 399 F.2d 738, 739 (5th Cir.1968); *Shultz v. Merriman*, 425 F.2d 228 (1st Cir.1970); *Wirtz v. Koch*, *supra*. The prototype telephone, the physical embodiment of Spacefone's unperfected plans, falls into the same category. Third, the prototype was produced "for commerce" because Spacefone, by circulating the prototype interstate to investors, attempted to sell it interstate.[7] *Cf. Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1355–1356 (11th Cir.1983) (By soliciting orders interstate, manufacturers caused product to "enter into commerce" within meaning of Lanham Trade Mark Act).

We accordingly hold that Johnston was engaged in the production of goods for commerce.

REVERSED and REMANDED for proceedings consistent with this opinion.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. Since the employer never produced goods for commerce, Johnston could not have been engaged in such production. This case is unlike those relied upon by the Court which hold that where the employer is engaged in the production of goods for commerce, the support personnel, so to speak, are engaged in that effort, even if they are engaged in research and development, maintenance, or office and administrative work. *E.g., Borden v. Borella*, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865 (1945); *Tormey v. Kiekhaefer Corp.*, 76 F.Supp. 557 (E.D.Wis.1948). In those cases the employees' activities contributed in some way to the employers' actual production of goods for commerce.

Here, however, Spacefone Corporation was formed for the sole purpose of developing and marketing a cordless extension telephone. It never accomplished that, nor did it manufacture and sell any other product. Thus plaintiff never aided in any way, directly or indirectly, the production of any good sold in interstate commerce. Even under the most expansive interpretation of the statute, he was not "engaged in the production of goods for commerce." 29 U.S.C.A. §§ 206–207.

Nor was Johnston engaged in interstate commerce, even if his employer was not, to bring him within the principle of *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211, 79 S.Ct. 260, 263, 3 L.Ed.2d 243 (1959). Johnston introduced evidence that he spent a substantial amount of time using an instrumentality of commerce, the telephone, in connection with his job for Spacefone. The regular and recurrent use of the mails and other channels of communication by an employee as a part of his duties is sufficient to demonstrate that the employee is engaged in commerce, *Montalvo v. Tower Life Building*, 426 F.2d 1135, 1143–44 (5th Cir.1970), but "[t]his does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage." 29 C.F.R. § 776.10(b) (1981). The trial court found that Johnston's interstate telephone calls "were not part of his regular duties, were incidental to his primary employment, and did not constitute a substantial portion of

6. Congress defined "goods" broadly:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

29 U.S.C. Sec. 203(i).

While FLSA requires the production of good s, Spacefone produced only one prototype. We decline to interpret the statute literally because to do so would frustrate FLSA's purposes. *See supra*.

7. The perhaps more typical situation is where the plan is sold to a third party who, based on the plan, carries out the actual production or construction. Here Spacefone, rather than a third party, intends to produce goods based on the plan it has conceived. This does alter the fact that Spacefone in effect attempted to sell its plan interstate to third parties.

plaintiff's time." While the amount of usage is not determinative, utilization of the channels of interstate communication must be a regular and recurrent part of the employee's responsibilities under *Mostalvo* and 29 C.F.R. § 776.10(b) (1981). The trial court's finding of fact is not clearly erroneous. Johnston failed to prove he was "engaged in commerce." 29 U.S.C.A. §§ 206-207.

I would affirm.

Sadie D. MORGADO, Plaintiff-Appellant, Cross-Appellee,

v.

BIRMINGHAM-JEFFERSON COUNTY CIVIL DEFENSE CORPS, et al., Defendants-Appellees, Cross-Appellants.

No. 81-7282.

United States Court of Appeals, Eleventh Circuit.

June 10, 1983.

Appeals were taken from a judgment of the United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., Chief Judge, in favor of female employee in suit under Title VII and Equal Pay Act alleging underpayment on basis of sex. The Court of Appeals, Clark, Circuit Judge, held that: (1) evidence of discrimination was sufficient; (2) employer was not entitled to affirmative defense that pay differential was made pursuant to merit system or factor other than sex; (3) district court should not have reduced hours remunerated in calculating attorney fee award; and (4) district court should have accounted for inflation and delay in calculating hourly rate for attorney fee award.

Affirmed in part, reversed in part and remanded.

1. Labor Relations ⇐1521

Prima facie violation of Equal Pay Act is established when it is shown that employer pays different wages to employees of opposite sex for equal work on jobs performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d).

2. Civil Rights ⇐44(5)
Labor Relations ⇐1522

District court in suit under Equal Pay Act and Title VII was not clearly erroneous in finding that female agency employee did work substantially equal to that of the "Shelter Officer," a male, on a job requiring skill, effort and responsibility substantially equal to skill, effort and responsibility required of him, yet was paid less. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Federal Courts ⇐858

Findings of fact of district court in Title VII action are weighed against clearly-erroneous standard; under this standard, findings of fact are not to be rejected unless reviewing court is left with definite and firm impression that mistake has been made. Fed.Rules Civ.Proc.Rule 52, 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐9.14
Labor Relations ⇐1333

Exception to an employer's liability for discrimination in pay under Title VII and Equal Pay Act, that is, that pay differential was made pursuant to a merit system or a factor other than sex, did not apply in instant suit by female employee alleging underpayment on basis of sex; simple fact of existence of written job descriptions did not constitute a merit system and did not justify male employees receiving pay higher

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8143

D.C. Docket No. C81-85N

WILLIAM J. JOHNSTON,

Plaintiff-Appellant,

versus

SPACEFOME CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and PITTMAN*, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 9, 1983

RONEY, Circuit Judge, dissenting.

*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

ISSUED AS MANDATE:

William J. JOHNSTON,
Plaintiff-Appellant,

v.

SPACEFONE CORPORATION,
Defendant-Appellee.

No. 82-8143.

United States Court of Appeals,
Eleventh Circuit.

Aug. 22, 1983.

Appeal from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 9, 1983, 11 Cir., 1983, 706 F.2d 1178).

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and PITTMAN *, District Judge.

* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

The opinion of the court is amended to delete in the third paragraph these sentences:

> Despite the absence of a formal written contract, the parties agreed that Johnston was to receive $250 per week for his services. While Johnston sometimes received the agreed upon sum, he sometimes received nothing at all.

and to substitute the following:

> Johnston alleges that despite the absence of a formal written contract, the parties agreed that Johnston was to receive $250 per week for his services. He alleges that while he sometimes received the agreed upon sum, he sometimes received nothing at all.

In all other respects the petition for rehearing is DENIED.

No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

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